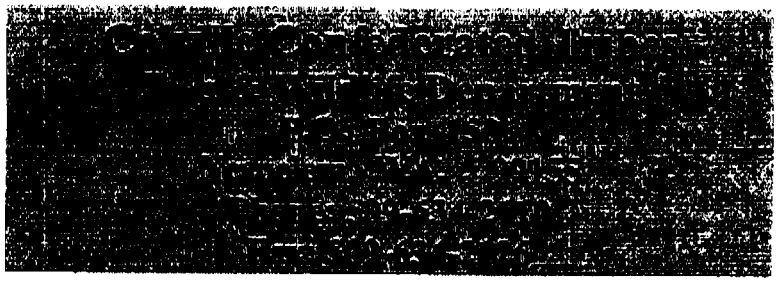
APPENDIX H:
Colville Confederated Tribes Response to the NWPCC Independent Science Review Panel



March 22, 2002

1996604200

Northwest Power Planning Council
Attn: Larry Cassidy
851 SW 6th Avenue, Suite 1100
Portland, OR. 97204-1348

Re: ISRP Review of Project 199604200: Restore and Enhance Anadromous Fish Populations and Habitat in Salmon Creek

The ISRP's review of the Salmon Creek project addresses some important science concerns related to our project, the resolution and clarification of which will help us to improve the overall quality of this project. However, it was also clear to us from the ISRP's response that our proposal and presentations did not adequately explain certain key elements of our proposal. We are very concerned that the ISRP reached a "no fund" recommendation based on a lack of clarity in aspects of our proposal and significant resultant misunderstandings of our project. We would also like to address some major policy issues associated with the Salmon Creek project which need to be considered along with our response to the science related issues in a reconsideration of the ISRP's "no fund" recommendation. Our response will address the science review issues first and then summarize the key policy considerations we hope the Council will take into account in their decision on the Salmon Creek project.

The Colville Confederated Tribes (Tribes) respectfully request that the Council set aside the ISRP's "no fund" recommendation. The ISRP's incomplete and inaccurate understanding of the project (represented for instance, by their concern that there is no documentation of fish production and no monitoring/evaluation program) suggests that a more appropriate determination at this stage would be to request additional information and clarification through a "response review is needed" designation. In project proposal reviews in preceding years the ISRP has in fact *commended* the Salmon Creek project and recommend it for funding. Additionally, the Council has historically directed substantial dollar commitments to the Salmon Creek project, indicating support for the project.

It appears that in part the ISRP had difficulty reviewing the Salmon Creek funding proposal because many specific details of the project can't be finalized until the NEPA review and rehabilitation design work is completed (this work is currently underway). The NEPA process will result in identification of a preferred salmon recovery scenario with a corresponding preferred water supply alternative. In addition, the stream rehabilitation design will have advanced well beyond the conceptual level presented in the project proposal in concurrence with the NEPA review.

The Tribes propose to revise the FY 2003-2005 Salmon Creek proposal to assure a more thorough understanding by the ISRP of the project and its scientific basis. This proposed revision will be completed prior to the final ISRP review scheduled for June. Budgets for FY 2001 (committed) and FY 2002 (in process) will carry the Salmon Creek NEPA analysis and design to that milestone. The NEPA EIS and

Record of Decision signed by BPA will provide a sound basis for final selection of the preferred alternative. Just as the Council has conditioned continuation of the Salmon Creek program on review of the NEPA scoping document, we suggest that the Council direct the program to present the outcome of NEPA as a condition of continued funding. At that time, a revised budget and funding strategy can be submitted for Council consideration with greater detail and certainty based on the selection of a preferred alternative through NEPA.

In the meanwhile, it will be necessary to complete processing of the FY 2002 funds and to provide additional "lifeline funding" to maintain current staffing by the Tribes and BPA and to complete the NEPA process. We appreciate your consideration of this critical request and look forward to your favorable review of our suggestions. The Salmon Creek project is a highly visible and important project to the Colville Confederated Tribes, the Okanogan Irrigation District, and the people and natural resources of Washington State. Your continued support of this model project is essential to its successful implementation.

Sincerely,

Colville Confederated Tribes
Joe Peone, Director
Fish and Wildlife Department

cc: Bob Austin, BPA
Dale Bambrick, NMFS
Dennis Beach, WDFW-Ephrata
Mark Fritz, NWPPC
Stacy Horton, NWPPC
Tom Karier, NWPPC
Tracy Lloyd, WDFW-Ephrata
Bob Lohn, NMFS
Doug Marker, NWPPC
Sara McNary, BPA
Craig Nelson, Okanogan Conservation District
Richard Price, OID
Tom Sullivan, OID

SCIENCE CONSIDERATIONS

The ISRP review states water temperatures in the Okanogan River exceed 80 degrees F, which is unsuitable for salmon.

It is true that in summertime elevated water temperatures in the Okanogan River create a thermal barrier to migrating salmonids, particularly sockeye salmon that migrate during those months. During 2000, high water temperatures (peak-74^{o}F, CCT, unpublished data) have been recorded in the Okanogan River (~ RM 15; Figure 1). However, the proposed pump station, at least conceptually, is intended to deliver "warm" water from the Okanogan River to orchards and farmland within the irrigation district while allowing "cool" water (peak-66.3^{o}F (2000), CCT, unpublished data; Figure 2) historically diverted from Salmon Creek to flow downstream. In addition, this would also address Washington Department of Ecology's (WDOE's) 303D listing of inadequate flows in lower Salmon Creek. The cool water, which has been diverted historically for irrigation, would flow through the lowermost 4.3-mile reach of Salmon Creek to the Okanogan River providing benefit to both adult and juvenile salmonids. In addition, this "cool" water discharge from Salmon Creek would likely create a thermal refuge in the Okanogan River, and likely be utilized by migrating sockeye salmon. Based upon radio-telemetry tagging studies conducted by Douglas County PUD, sockeye have held in cool water refugia created by tributaries, such as Aneas Creek (~ 4 cfs, 64 ^{o}F, CCT, unpublished data), during migration through the Okanogan River. The thermal refugia may also be used by juvenile salmonids. For instance, Belchik (1997), reported extensive use thermal refugia at tributary mouths in the Klamath River.

It is also important to note discussions by area biologists and consultants have been directed towards selecting "early returning" spring Chinook salmon adults as broodstock for Salmon Creek. By selecting "early returning" adults for broodstock, it is expected that progeny would also be "early returning" and avoid the thermal barrier that develop in the Okanogan River. We anticipate that diligent pursuit of this concept will likely result in the successful development of an early run chinook salmon stock unique to the Okanogan Basin.

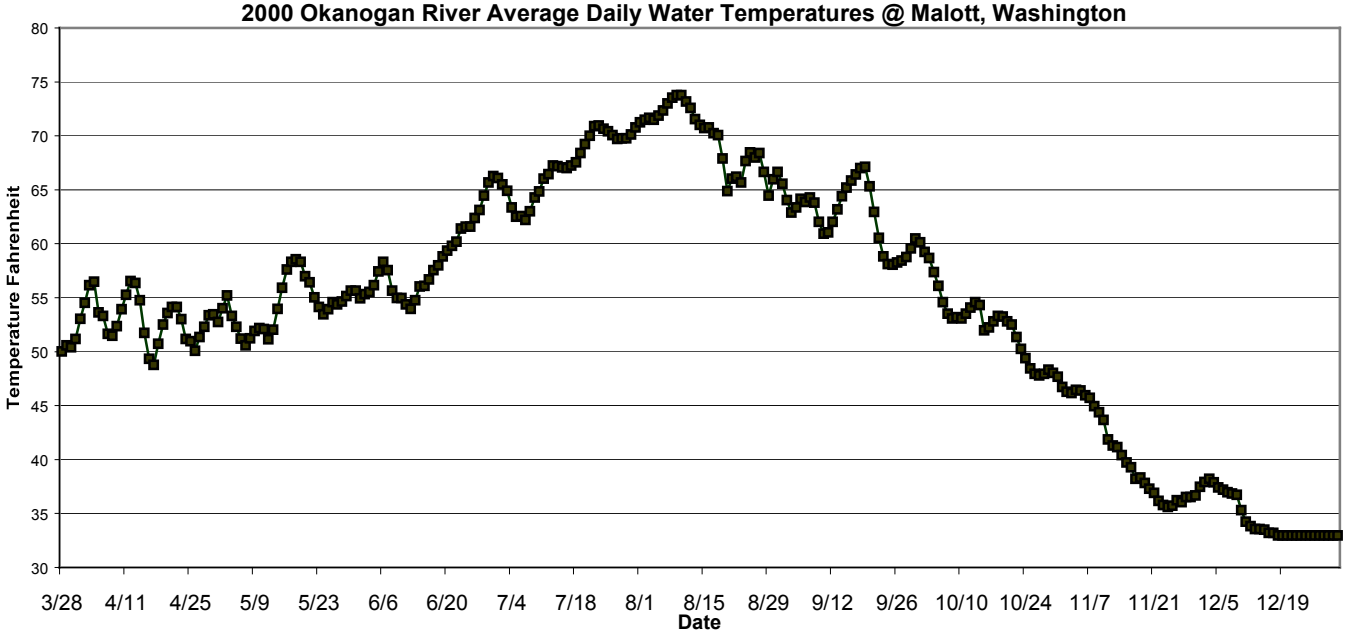


Figure 1. Daily average water temperatures (^{o}F) in the Okanogan River at Malott, WA. during 2000 (CCT, unpublished data).

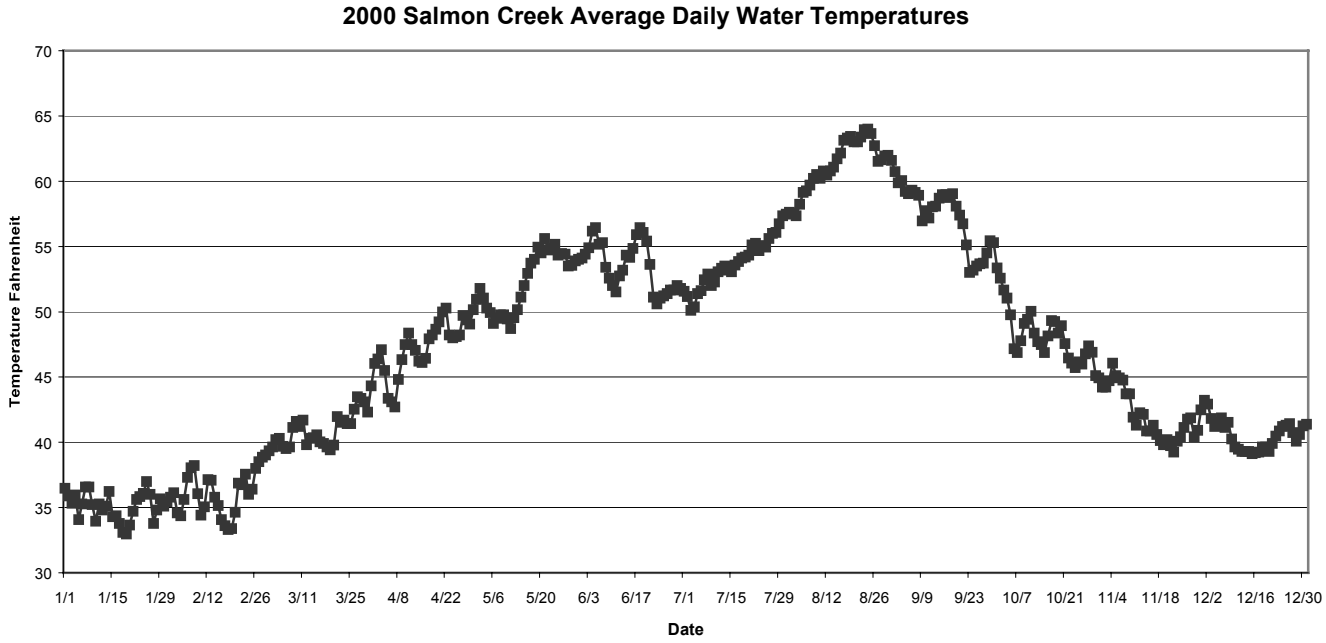


Figure 2. Daily average water temperatures (^{o}F) in Salmon Creek, within the middle reach, during 2000 (CCT, unpublished data).

The ISRP review states, "No significant benefit to fish is to be expected from this proposed project, which focuses on highly degraded habitat (de watered etc.) that would take an extensive effort and considerable resources to restore." And "an alluvial fan at the mouth does not allow passage of salmonids except at flood stage. An Entrix study found released flows alone would not restore the stream. A channel would be dug."

Again, it is true that limited spawning and rearing habitat exists in the lower 4.3 miles of Salmon Creek. The primary function of this reach in the context of this proposal is to provide passage. The limitations of this particular reach are due to the steep gradient of this stream reach and the current condition of the stream channel. However, based upon field evaluations, approximately 2.6 miles (RM 4.3 to 1.7) of the lower reach is capable of providing adequate spawning and rearing habitat for anadromous salmonids. This reach would require only "spot" treatments to improve bank stability and grade control. More extensive stream channel restoration techniques (installation of instream structures, reconstruction of stream bank, removal of fluvial deposition, reestablishment of riparian vegetation) will be required in the lowermost 1.7 miles. However, by rehabilitating this reach, a migration corridor for anadromous salmonids would be ensured and access provided to approximately 11 miles of good spawning and rearing habitat. Furthermore, spawning and rearing habitat would likely improve within the lower 4.3 miles as continuous flows were provided which would in turn promote development of increased habitat complexity. Looking farther to the future (10 to 15 years), it may be desirable to also undertake habitat improvement work within the lower 1.7 miles of Salmon Creek.

The ISRP review states, "There are no remnant stocks of spring chinook, so they would need to be introduced from outside. There is no description of a monitoring and evaluation plan that ought to be undertaken."

It is true that there are no remnant stocks of spring chinook in the Okanogan River. However, the Colville Tribes are attempting a reintroduction of spring chinook salmon within the Okanogan Basin at Omak Creek, a tributary to the Okanogan River approximately 4 river miles upstream of Salmon Creek. The Carson stock

spring chinook salmon has been approved in both the Okanogan River and in Omak Creek and is currently being used in both systems. It is likely, therefore, that this stock would initially be planted in Salmon Creek.

The use and source of Carson stock chinook salmon and the development of a monitoring and evaluation plan are still under consideration. Several monitoring and evaluation techniques (i.e. redd surveys, snorkel surveys, adult trapping, smolt trapping, etc.) have been discussed as potential options. However, it has been suggested that the preferred option to evaluate production in Salmon Creek should be smolt monitoring. This technique would provide the most accurate estimate of production in Salmon Creek. If smolt monitoring is the agreed upon option, then this option will be further developed and described in a detailed monitoring and evaluation plan. An important element of development of the monitoring and evaluation plan, and use of Carson stock chinook salmon, is consultation and approval by the National Marine Fisheries Service (NMFS). Any final decision will be contingent upon consultation with and approval by the NMFS.

The ISRP review states rough predictive estimates that 150 steelhead, and 130 chinook might result from restoration of this stream reach.

The predictive estimates (150 steelhead, 130 spring chinook) offered to the ISRP the proposal presentations in Wenatchee represent a very conservative number within an expected range. However, based upon field surveys and survival rates for different life stages, predictive estimates could be substantially greater (steelhead 6 to 804; spring chinook 121 to 184) than the numbers expressed during that presentation, particularly in the case of steelhead.

Production estimates were developed based on habitat sampling conducted during 1997. Potential spawning habitat estimates were based upon preferred substrate, depth and velocity criteria for each species. The production estimate cited above is for the eleven-mile reach beginning at the Okanogan Irrigation District diversion dam (RM 4.3) upstream to the base of the Conconully Reservoir Dam (~ RM 15.0). However, this estimate for the eleven-mile reach is based upon the evaluation of spawning habitat from ~RM 15.0 to 9.0, or a 6-mile reach in the uppermost section of the 11 mile reach.

The estimate of steelhead fry production was based upon the poorest substrate (highest % of fine sediment, 41.9%) measured in the sample reaches within the six-mile reach and equated to 50% egg-to-fry survival. For the 11-mile reach, the production of steelhead fry was estimated at 530,128. Using Bjorn's (1978) range for steelhead fry-to-yearling (0.4 to 3.8%) on the Big Springs Creek on the Lemhi River, a range for smolt production was estimated to be 2,120 to 20,145. The smolt-to-adult returns recorded at Wells Hatchery from 1986 to 1994 ranged from .28 to 3.99%. Applying this range of smolt-to-adult return to the smolt estimates (2,120 to 20,145), the estimated adult steelhead return is 6 to 804. Based upon available habitat in the Okanogan River, the Washington Department of Fish and Wildlife (WDFW) estimate current escapement levels for naturally produced steelhead within the U.S. portion of the Okanogan River at between 300 and 500 fish. The estimated production of steelhead in Salmon Creek would clearly contribute a substantial proportion to the Okanogan River as well as providing resiliency to the steelhead population in this basin.

Similarly, during the 1997 Salmon Creek spawning habitat evaluation we estimated egg production for spring chinook at 1,091,070 (based upon fecundity and available habitat) for the six-mile reach. Extrapolating that estimate for an 11-mile reach provides an egg estimate of 1,582,051. Using Mullin et al. (1992), egg-to-smolt survival range for the Entiat River of 1.55% to 2.35%, provides an estimate of 24,521 to 37,178 smolts. Using an average smolt-to-adult return from the Methow River Basin from 1985 to 1990 of .66% results in a range of 161 to 245 spring chinook adults returning to Salmon Creek. One other factor that would likely influence the number of returning adult spring chinook to Salmon Creek is that the Okanogan River typically becomes a thermal barrier to migrating salmonids from about mid-July to mid-September. Water temperatures measured in the Okanogan River in 1997 exceeded the lethal water

temperature for spring chinook by July 20, and by Aug 1 during 1998. According to the Douglas County PUD, approximately 25% of the adult spring chinook salmon migration at Wells Dam occurs after July 20. Therefore to err towards the conservative our estimates for adult spring chinook salmon returns to Salmon Creek were reduced by 25%, thus 121 to 184.

It is also important to recognize that production estimates for Salmon Creek are based on the present day (1997) conditions upstream of the Okanogan Irrigation District diversion dam. The Natural Resource Conservation Service is in the process of employing a Range Conservationist and Environmental Engineer to work with landowners on reducing surface erosion and streambank failure. This effort should result in a reduction of fine sediment delivered to the stream channel. Over time, the proportion of fine sediment in spawning gravels would decrease and fish production would likely increase.

Large-scale investment in steelhead projects in the Okanogan Basin, such as the proposed Salmon Creek Project, appear less warranted based on the greater uncertainty of positive outcomes.

The proposed scale of investment for the Okanogan Basin is relative compared to other recent and ongoing investments in hatchery facilities and habitat, lower in the Columbia Basin. Hatchery and tributary investments to increase the viability of other ESU's do not affect the Upper Columbia River steelhead ESU; it is still endangered, at high risk of extinction, and a legal threat to the operation of the Federal Columbia River Power System, PUD hydroelectric projects, and the local economy of the Columbia Cascade Province. Furthermore, the lower basin hatchery and tributary habitat investments do not return one fish to the Colville Tribes and do nothing to restore even a minimal ceremonial and subsistence fishery for the Tribes.

Monitoring was Explicitly Addressed in the Proposal

It is difficult to understand how the review could fault the lack of plans to monitor and evaluate. The first paragraph of the proposal describes the purpose of the proposed Steam Management and Recovery Plan (SRMP) as "to monitor and evaluate measurable improvements to habitat productivity and populations in Salmon Creek." This is further addressed in the proposal abstract (under the head "monitoring and evaluation") and in the body of the proposal (the topic is broadly discussed under the section regarding the SMRP and a paragraph on monitoring is provided for each element of the proposal). If this was a reason for the "no fund" recommendation, it overlooks the contents of the proposal itself.

Literature cited

Belchik, M. 1997. Summer locations and salmonid use of cool water areas in the Klamath River Iron Gate Dam to Seiad Creek. Yurok Tribal Fisheries Program, Klamath, California. 13 pp.

Bjornn, T. C. 1978. Survival, production, and yield of trout and chinook salmon in the Lemhi River, Idaho. University of Idaho, College of Forestry, Wildlife and Range Sciences Bulletin 27, Moscow.

Mullan, J.W., K.R. Williams, G.Rhodus, T.W. Hillman, and J.D. McIntyre. 1992. Production and habitat of salmonids in mid-Columbia River tributary steams. U.S. Fish and Wildlife Service.Monograph I.

POLICY CONSIDERATIONS

- ***A History of Positive Reviews:*** The Salmon Creek project is essentially unchanged since it received a complimentary and positive recommendation from the ISRP in the 2001 proposal process. That review stated in part "The proposal is very well done with clearly stated problems and measurable objectives. It was good to see the results of the watershed assessments being put to use. The need for the project is clear and the area is historically important." The inconsistency between the 2001 and 2003 reviews puzzles and troubles us. We are particularly concerned because the Salmon Creek program satisfies all of the criteria necessary to be rated "fundable": that is, it is scientifically sound, benefits fish and wildlife, has clearly defined objectives and outcomes, and provides for monitoring and evaluation of results (see further discussion below). It is disturbing that the ISRP review is not couched in terms of these criteria (except in the case of comments on monitoring and evaluation, and these comments simply overlook the content of the proposal as discussed further below).

  Positive reviews have been forthcoming outside the Council process as well. For example, the Colville Tribes have been involved in Washington's ongoing process to revise state water law under the auspices of a joint Executive and Legislative working group consisting of representatives of the Governor's office and the Director of Ecology, as well as members of the key legislative committees with authority over water resources policy. That working group has unanimously acknowledged the Salmon Creek project as a model project. Recognition of the Salmon Creek Project is one of the few things that the diverse interests comprising this working group have been able to agree upon.

- ***Track Record of Funding:*** The Salmon Creek program is an ongoing project which has received funding since 1997. Salmon Creek funding totals nearly $6.5 M to date, with $3.3 M of that provided through the Council's program. Since the Salmon Creek project inception, project proponents have matched Council funding with funding from other sources virtually dollar for dollar. We are unaware of any other Council project of this scope that has achieved a similar level and breadth of funding support. Our ability to leverage funds to this degree demonstrates a high level of confidence in the merits of this project on the part of multiple funding sources; each of which is committed to scientifically and economically defensible salmonid mitigation and rehabilitation. Those who have provided matching funding support have done so in part because they were assured by the Council's ongoing investment in the Salmon Creek project. The Council's support of this project indicated to other project funding sources that the project was carefully reviewed and relatively steadfast. For example, recent BPA comments to the Council (on the Blue Mountain and Mountain Snake project proposals) note that BPA gave top priority to existing (ongoing) projects where a decision to not fund the project would significantly jeopardize the investment that the Region has made to date. The Council is not well served by the appearance of fluctuation in its scientific and policy objectives when seeking to leverage its investments in salmon mitigation programs. The Tribes are pursuing a funding strategy that is anticipated to continue leveraging supplementary funding opportunities. We would be delighted to discuss this project's funding history and our leveraged funding strategy in detail with the Council or its staff at any time.

- ***NEPA Process:*** Important concerns raised by the ISRP include water supply, restoration design, fish production, and the use of Okanogan River water in the project. Each of these concerns has been raised and is being addressed through the Salmon Creek NEPA process. The Salmon Creek NEPA has been initiated under current funding and will be completed under funding provided for fiscal years 2001 and 2002. NEPA is intended to be the environmental "full-disclosure" process for federal decision-making, and it is essential that decision-makers engaged in the NEPA process not prejudge the outcome of the NEPA analysis. The Council has directed that the NEPA Scoping Document be presented for review as a condition of proceeding further with the Salmon Creek project. The NEPA scoping period did not close until after the ISRP review and the Scoping Document is now under preparation and will be brought to

the Council in April. Assumptions made in the ISRP review have the effect of prejudging the outcome of NEPA analysis, as we comment further below.

- ***NEPA Alternatives:*** The ISRP review appears to be based on the assumption that one among several NEPA alternatives will be the one selected for implementation (the full-scale, 80 cfs Okanogan River pump exchange). While it is true that this option has been the basis for past funding proposals, in fact this alternative may not be the preferred alternative and it would be inappropriate to draw such a conclusion today. The Council was presented with the higher cost alternatives because at the time FY 2003 proposals were due, a three-year program needed to be scoped and NEPA had not been initiated. Therefore, the decision was made to submit costs for the pump exchange project in order to ensure that there would be sufficient funds available if that alternative were ultimately selected for implementation. As a result of the NEPA scoping several new alternatives have been identified, all of which will almost certainly be less costly, some of them substantially less. A final decision on this question may not be made before the Draft EIS is published (currently scheduled for June 2003). Among the alternatives under consideration are several which have emerged in the just-concluded scoping process that would require less water, less (or no) infrastructure, and could cost much less money to complete. As the BPA NEPA Statement of Purpose and Need makes clear, the selection of a preferred alternative is a decision to fund, and cost effectiveness will be more appropriately taken into account when actual costs and benefits are clear. Alternatives under consideration also include means to offset or pay for pumping costs should the pump exchange alternative be preferred. In their review the ISRP also focused on issues that concerned the public in their comment during NEPA scoping. These concerns will be addressed in the NEPA process now underway, and should not be the basis for premature termination of the alternatives analysis and NEPA-based decision-making by BPA, as advised by the Council.

- ***The "Shellrock" Alternative:*** We are already pumping water, it is not a new concept. Okanogan Irrigation District currently holds Okanogan River water rights and pumps water from the Okanogan River as necessary to meet irrigation demand using an existing District pump station at Shellrock. The alternative which the ISRP made comments about merely extends an existing approach to water supply in the basin. One variation on this alternative that has emerged from NEPA scoping would provide water only for steelhead (not spring Chinook), resulting in a much lower water requirement. This water requirement could be supplied by upgrading the existing Shellrock facility. The Phase 1 (conceptual planning) estimate of the cost of upgrading Shellrock was $0.5 M. If this is selected an the alternative, it would profoundly revise the calculus upon which the ISRP review is based.

- ***The "Farm" and "District" Water Purchase Alternatives:*** Other NEPA alternatives are being developed as a result of scoping comments. These include analysis of purchasing individual farms and placing the water shares appurtenant to them in Washington's Trust Water Program, or negotiating with the District for purchase of a share of the District's water rights. Neither of these alternatives would require costly infrastructure, but both entail extended financial analysis in the course of NEPA compliance. It is possible that either or both may be substantially less expensive than the Okanogan River pump exchange.

- ***The Implications of the NEPA "No Action" Alternative:*** A "no fund" decision by the Council would place the Okanogan Irrigation District and rural economy of the region in serious jeopardy of realizing the full impact of the NEPA "No Action" alternative. All NEPA analyses are required to consider a "No Action" alternative, which in this case would be to do nothing to increase flows in Salmon Creek, rehabilitate habitat and recover salmonids. Under such an alternative, the District's water diversions, which have supported an irrigation economy for the Okanogan area for more than 80 years, would be subject to enforcement under the Endangered Species Act as the Okanogan Basin is listed as "critical habitat" by NMFS for summer steelhead. Enforcement could result in federal reallocation of water to instream flows, without the benefits of planning and investment to offset what certainly would be very

significant social and economic effects for the region. To accept this outcome when a true "win-win" solution is within grasp would be a tragedy (the Salmon Creek project has been favorably received by the relevant federal and state agencies). Actions taken or not taken here set a precedent and establish a model for small rural agricultural communities throughout the Northwest. Throughout the region, the economic viability of these communities depends upon finding truly mutual, inclusive solutions to the challenges posed by salmonid listings.

- ***A Model for Columbia River Basin Collaboration between Tribes and Irrigators:*** The Tribes have joined the Okanogan Irrigation District to forestall precisely the "No Action" type of scenario described above. The Tribes and District have worked diligently and collaboratively for years so that both sets of objectives can be met: salmonids may have the instream flows necessary for their recovery, while irrigation may continue with the reliability necessary for economic survival. The ISRP considers only the fish side of this equation in its review, but the benefits of the project are greater and more is at stake than just the number of fish returned, important as this may be; the Council would serve the Northwest well by considering both sides as far as it is able

- ***Salmon Recovery is a Social Goal:*** Recovery of listed species is a social choice and a policy goal as much as it is a science-based activity. Science guides social actions to be as effective and well chosen as they can be, but science has nothing to say about the social values that may be placed upon an investment. In the ISRP review of the Salmon Creek project, the ISRP steps beyond their mandate of providing independent scientific review and wanders into the arena of social choices and policy making. Whether or not the level of investment warrants the return is a question that lies beyond the expertise and purview of a purely scientific review. For example, even assuming that the fish production of the project were as low as the ISRP identified in their review, the augmentation of steelhead populations achieved would represent a *100 percent* increase in the average number of steelhead returning to the Okanogan watershed. Another example of comparing the investment to the cost is apparent with the Snake River Sockeye program. This is a strong science based program, but even beyond the purely scientific merits it's the programs cost or investment has been acceptable to the general public or region including us From a Council policy point of view, and from the Tribes' point of view, this achievement may be a very worthwhile investment, one whose significance is inappropriately understated by the analysis of "dollars per pound" of fish, as we discuss further below.

- ***Mitigation of Upper Columbia Hydro Impacts on Colville Confederated Tribes Fisheries is Profoundly Overdue:*** The Regional Power Act, which established the Northwest Power Planning Council in 1980, reflected the region's awakening to the need to mitigate the vast effects of the Federal Columbia River System upon the fish and wildlife resources of the Columbia Basin. Even a small spring chinook run in the Okanogan/Salmon Creek may be highly significant to the Colville Tribes, considering what was lost after Grand Coulee was constructed and the paucity of mitigation that has followed in the ensuing decades. Most Colville tribal members have historically relied on fisheries that were severely reduced by the construction and operation of Grand Coulee dam, which eliminated 1240 river miles of habitat and inundated many tribal fishing sites on the Columbia River that had been available to tribal members prior to the Dam's completion in 1940. The Salmon Creek project represents one among many steps that will be needed to address these longstanding impacts to tribal members, and the Tribe feels strongly that the Okanogan Basin must be a focus of concern and significant investment in the Council's larger fish and wildlife program. Considering the scant fisheries resources remaining to the Tribes, the returns of fish to Salmon Creek will be of profound cultural and spiritual importance to tribal members. The Tribes request that the Council put due emphasis on these values and not rely on cost calculations that ignore them.

- ***Distinguish Costs of Rehabilitation from Cost of Water Supply:*** The ISRP Review fails to distinguish between the cost of Salmon Creek restoration (or rehabilitation) and the cost of water supply alternatives. The latter are *alternatives*, subject to NEPA analysis leading to a decision which has not yet been made, and may or may not include high investment in infrastructure (e.g., pump exchange) depending on alternative levels of flow, as discussed above. The cost to rehabilitate the lower reaches of Salmon Creek to allow fish passage is reasonable. The required investment in water supply will be fully analyzed in the ongoing NEPA process, and BPA as the lead agency will select that alternative that meets its obligations in an environmentally sound and cost-effective manner.

- ***Are There Known, Less Costly Alternatives That Meet the Same Objectives?*** The Council should compare the Salmon Creek investment to other Okanogan Basin alternatives before coming to a "no fund" decision. The ISRP in its review document states that it will base its recommendations for habitat restoration projects on an "…attempt to estimate the expected contribution to fish runs and to relate these expectations to the historical and current runs in the subbasin. The expected costs of restoration should be placed in the context of dollars per expected adult return, for purposes of comparing among potential restoration projects (a relative measure). They should also compare alternative restoration strategies for the site on the same yield and cost basis, again for comparative purposes." However, nowhere in the ISRP recommendation do we find the results of such a comparison. Indeed, given the average historical returns of steelhead to the Okanogan Basin as documented in the LFA report, the Salmon Creek project would clearly and substantially contribute to fish runs.

Anadromous fish restoration in the Columbia Cascade Province and the Okanogan River will always have greater uncertainty and likely less positive outcomes due to it's the region's location above so many run-of-the-river hydroelectric dams and because anadromous salmonid passage to much of the area has been blocked by Grand Coulee and Chief Joseph dams. This situation is largely why two of the Province's anadromous fish species are currently endangered. Decisions on fish and wildlife program investments must consider cost-effective opportunities within each ESA-listed ESU and within the waters and lands of each Native American Tribe.

Reserved Fishing and Instream Water Rights of the Colville Tribes and the Federal Trust Responsibility To Protect Those Rights

It is critically important to bear in mind that federal funding decisions affecting anadromous fish restoration on and near the Colville Reservation also implicate the federal government's trust responsibility to protect the federal reserved fishing and water rights of the Colville Tribes. The historical and legal background to this is as follows:

The Colville Reservation was established by Executive Order in 1872. At that time the Reservation consisted of all the lands within the United States bounded by the Columbia and Okanogan Rivers, roughly 3.0 million acres. The U.S. Court of Appeals for the 9th Circuit has unequivocally ruled that under the 1872 Executive Order one of the primary purposes of the Colville Reservation was to preserve tribal fisheries and access to traditional tribal fishing areas. *Confederated Tribes of the Colville Reservation v. Walton*, 647 F.2d 42 ("*Walton*"). The 9th Circuit also ruled that the Colville Tribes possesses federal reserved water rights to instream flows sufficient to preserve or restore the tribal fisheries reserved in the 1872 Executive Order. *Walton*, 647 F.2d 42.

In 1891, the Colville Tribes entered into an Agreement with United States in which the Tribes ceded the North Half of the 1872 Reservation. The ceded area consists of roughly 1.5 million acres between the

Canadian border and the current northern boundary of the Reservation. In the 1891 Agreement the Tribes expressly reserved the right to hunt and fish, which was "not to be abridged in any way." The U.S. Supreme Court has ruled that the 1891 Agreement was lawfully ratified by Congress and that the hunting and fishing rights reserved by the Tribes in that Agreement are in full force and effect today. *Antoine v. Washington*, 420 U.S. 194 (1975). The hunting and fishing rights for the North Half also include gathering rights and, most importantly for present purposes, the reserved water rights recognized in the *Walton* case to support fish restoration and preservation and to support wildlife and plant habitat.

In sum, under the above legal history, the Colville Tribes possesses reserved fishing rights and instream water rights, arising under well-settled principles of federal law, throughout the current Colville Reservation and ceded North Half, which coincides with the extent of the original 1872 Reservation. The territory encompassed by these rights includes the entire length of the Okanogan River within the United States (some 75 river miles) and the Columbia River within the United States above the Okanogan confluence (some 160 river miles), as well as all tributaries within that area. The 9th Circuit has also clearly established that the priority date for these instream flow water rights, in relation to the State of Washington's priority system, is □time immemorial□ for any stream associated with an aboriginal fishery, *Klamath Water Users Protection Association v. Patterson*, 204 F.3d 1206 (9th Cir. 2000) *and United States v. Adair*, 723 F.2d 1394 (9th Cir 1984), and 1872 for any stream in which the Tribes is attempting to establish an introduced fishery, *Walton*, 647 F.2d 42. In most cases, the fishery in question is likely to be an aboriginal fishery, which triggers the ancient time immemorial priority date for the associated instream water right.

Finally, the Tribes' fishing and water rights are federally protected tribal assets or property rights, which all agencies of the United States have a trust responsibility to protect. *Menominee Tribes of Indians v. United States*, 391 U.S. 404 (1968). *Klamath Water Users Protection Association v. Patterson*, 204 F.3d 1206 (9th Cir. 2000).

The Salmon Creek project implicates the Colville Tribes' fishing and water rights in the Okanogan River, which lies within the Colville Reservation and ceded North Half and is subject to the fishing and "time immemorial" water rights described above. Rather than assert these rights in a confrontational or litigative fashion with respect to Salmon Creek, the Colville Tribes has pursued a proactive approach emphasizing cooperation with the Okanogan Irrigation District, to demonstrate that it is eminently possible to achieve tribal goals while also protecting the water supply and economic interests of the District. We have made significant progress toward a genuine "win-win" outcome, and as noted in other sections of this paper have gained broad recognition for a model approach to resolving this difficult problem. This is precisely the type of project that any federal agency should be eager to fund, because it furthers the purpose of the federal trust responsibility to protect the Tribes' rights, and does so without obliging the United States to attempt to restrict the junior State law rights of another user group. This is the case even if the funding agency in question takes the position that it has no particular trust responsibility to take specific action to protect the interests of the Colville Tribes; the point is that even without reaching the question of a specific agency's precise responsibility, support for the Salmon Creek project is obviously consistent with the overall federal trust responsibility and furthers the purposes and goals of that responsibility.

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